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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LEONARD,

Defendant and Appellant.

D073397

(Super. Ct. No. JCF38234)

APPEAL from a judgment of the Superior Court of Imperial County, Christopher J. Plourd, Judge. Affirmed and remanded with directions.

Neil Auwarter, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Robin Urbanski and Alastair J. Agcaoili, Deputy Attorneys General, for Plaintiff and Respondent.

While Robert Leonard was serving prison time for a different offense, the People charged him with possessing methamphetamine in prison (Pen. Code,<sup>1</sup> § 4573.6, subd. (a)). The indictment alleged he had suffered prior convictions, including under section 667.5, subdivision (b). Leonard pleaded no contest to one count under section 4573.6, subdivision (a).

The court rejected Leonard's contention that under the Criminal Justice Realignment Act of 2011 (Realignment Act; Stats. 2011, ch. 15, § 451), he should serve the new sentence in jail. Instead, it concluded Leonard was not eligible for a jail sentence under section 1170, subdivision (h), and sentenced him to a consecutive prison term of three years.

Leonard contends the court erred by sentencing him to prison instead of jail. The People concede the court erred, reasoning that section 1170.1, subdivision (c)<sup>2</sup> does not specify where Leonard's consecutive sentence should be served. They therefore request we remand the matter for the court to determine if a jail sentence is barred by Leonard's

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

<sup>2</sup> Section 1170.1, subdivision (c) states: "In the case of any person convicted of one or more felonies committed while the person is confined in the state prison . . . and the law requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison. If the new offenses are consecutive with each other, the principal and subordinate terms shall be calculated as provided in subdivision (a) [of this section]. This subdivision shall be applicable in cases of convictions of more than one offense in the same or different proceedings."

prior felony convictions. We affirm the conviction but vacate the sentence and remand the matter to the trial court for resentencing.

### FACTUAL BACKGROUND

The underlying facts are not relevant to the issues raised on appeal. Leonard was incarcerated for false impersonation and other crimes. The probation report shows Leonard had suffered a prior conviction for second degree burglary plus three felony prior convictions for burglary under section 459. But the probation report does not specify whether those latter convictions were for first degree burglary.

In sentencing Leonard, the court denied probation and stated, "[T]he law in the state of California is that if you're serving a present prison sentence and you get another offense, it can either run concurrent or consecutive, but [you have] to do one or the other in prison."

### DISCUSSION

Section 4573.6 states that "[a]ny person who knowingly has in his or her possession in any state prison . . . any controlled substances, the possession of which is prohibited . . . is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years."

Under the Realignment Act, section 1170, subdivision (h)(3) provides in part that "where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, [or] (B) has a prior felony conviction in another jurisdiction for an offense that has all the elements of a serious

felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision (c) of Section 667.5, . . . [,] an executed sentence for a felony punishable pursuant to this subdivision shall be served in the state prison." One court has stated, "Thus, section 1170, subdivision (h) makes a strike a disqualifying factor for sentencing to county jail under that statute." (*People v. Griffis* (2013) 212 Cal.App.4th 956, 962.)

In *People v. Griffis, supra*, 212 Cal.App.4th 956, the parties and the court agreed the record was insufficient to determine whether the defendant had committed a strike for purposes of sentencing under section 1170, subdivision (h). (*Griffis*, at p. 965.) The Court of Appeal remanded the matter to the trial court for resentencing. It held that the People need not plead and prove the prior serious or violent felony used to disqualify a defendant from a realignment sentence. (*Id.* at p. 964.) We agree with that position and adopt it here. Based on Leonard's probation report, his prior burglary convictions may be serious felonies under section 1192.7, subdivision (c)(18), or violent felonies under section 667.5, subdivision (c)(21). If so, a prison sentence would be mandatory. We will remand the matter for the court to determine in the first instance whether Leonard's prior felony convictions meet the criteria under section 1170, subdivision (h)(3). The People will have an opportunity to submit new evidence on that matter.

## DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the matter remanded to the trial court for resentencing consistent with this opinion. Following resentencing, the court is directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

GUERRERO, J.